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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/530,963	06/21/2005	Menachem Rubinstein	057878-16	3232
7590 David S. Resnick Nixon Peabody LLP 100 Summer Street Boston, MA 02110				
09/07/2010				
EXAMINER				
MARVICH, MARIA				
ART UNIT		PAPER NUMBER		
1633				
MAIL DATE		DELIVERY MODE		
09/07/2010		PAPER		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

**Advisory Action  
Before the Filing of an Appeal Brief**

**Application No.**

10/530,963

**Applicant(s)**

RUBINSTEIN ET AL.

**Examiner**

MARIA B. MARVICH

**Art Unit**

1633

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 16 August 2010 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 5 months from the mailing date of the final rejection.  
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.  
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**NOTICE OF APPEAL**

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

**AMENDMENTS**

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
(a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);  
(b) ☐ They raise the issue of new matter (see NOTE below);  
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Continuation Sheet (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.  
6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).  
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
The status of the claim(s) is (or will be) as follows:  
Claim(s) allowed: \_\_\_\_\_  
Claim(s) objected to: 1, 5-15, 17-19 and 34.  
Claim(s) rejected: 2 and 35-49.  
Claim(s) withdrawn from consideration: \_\_\_\_\_.

**AFFIDAVIT OR OTHER EVIDENCE**

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

**REQUEST FOR RECONSIDERATION/OTHER**

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: See Continuation Sheet.  
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s) \_\_\_\_\_.  
13. ☒ Other: See Continuation Sheet.

/Maria B Marvich/  
Primary Examiner, Art Unit 1633

Continuation of 3. NOTE: The amendment to claim 1 recites that the isolated DNA comprise a functional human IL-18BP promoter sequence "of SEQ ID NO:1". Literally a promoter sequence of SEQ ID NO:1 is any dinucleotide. Given this amendment, new consideration of sequences that can function as a promoter must be made. For example, Novick et al that teaches use of sequences from SEQ ID NO:1 in a construct with SEQ ID NO:5 would be applicable. However, it appears as if the claims are intended to mean that the isolated DNA sequence comprises "a functional human IL-18BP promoter sequence comprising the nucleotide sequence of SEQ ID NO:1". Similarly, the amendment to claim 2 reads on any dinucleotide of SEQ ID NO:1.

Secondly, following the amendment to claim 2, the recitation in claim 35 of "the fragment" no longer has antecedent basis.

Continuation of 11. does NOT place the application in condition for allowance because: Applicants arguments are moot in view of the non-entry of the amendment. However, it is noted that had applicants amendment been entered, the rejection under 35 USC 102 would have been overcome.

Continuation of 13. Other: Other informalities in the claims are noted.

In claim 10 and 41, the heterologous gene cannot encode a luciferase gene as a gene encodes a protein. Rather, --the heterologous protein is a luciferase protein--.

In claim 14 and 45, grammatically the phrase "being a mammalian cell" should be amended to --which is a mammalian cell--.

In claim 17 and 47, for simplicity and more direct recitation, the following amendment is proposed, --a DNA fragment comprising the DNA sequence according to claim 1 operably linked to a gene of interest--.

In claim 18 and 48, the gene of interest is not selected from the list of proteins as a gene encodes the protein rather -- the gene of interest encodes a protein selected from --.

Finally, the objections to claims 44-46 presented in the office action mailed 3/16/10 has not been addressed wherein "a vector" and "An isolated host cell" should use the article --The--.